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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 768

EDWARD ROGERS,

Petitioner,

vs.

WHITE METAL ROLLING AND STAMPING CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No.

EDWARD ROGERS,

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vs.

WHITE METAL ROLLING AND STAMPING CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case on November 12, 1957.

Opinions Below.

The opinion of the District Court for the District of Connecticut (R. 2a) and the opinion of the Court of Appeals for the Second Circuit (R. 14a) are both

unreported. The copy of the opinion of the Court of Appeals is appended to this Petition in the Appendix at page 14. The opinion of the District Court will be found at page 2(a) of the Record as printed for the use of the court below, 9 copies of which are filed with this Petition.

Jurisdiction.

The judgment of the Court of Appeals for the Second Circuit was made and entered on November 12, 1957 (R. 21a) and a copy thereof is appended to this petition in the Appendix at page 20. The petition of plaintiff-appellant (the petitioner herein) for a rehearing was denied on December 2, 1957 (R. 26a). The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

Questions Presented.

The questions presented are:

1. Whether a state statute, prohibiting the bringing of action in Connecticut to recover damages for injury to the person caused by negligence but within one year from the date of the act or omission complained of, as applied to a case where the injury was sustained in Missouri more than a year after the negligent act complained of, is an unconstitutional deprivation of remedy, contrary to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

2. Whether such statute, as applied to an action

brought in Connecticut by one who was injured in Missouri more than a year after the negligent act complained of, is in conflict with Article I, Section 12 of the Constitution of Connecticut which guarantees that every person, for an injury done him in his person, shall have remedy by due course of law.

3. Whether such statute is substantive in nature and therefor not applicable, under the Connecticut conflict of laws rule, to an action brought in Connecticut for an injury sustained in Missouri more than a year after the negligent act complained of.

4. Whether the application of such statute to an action brought in Connecticut for personal injuries sustained in Missouri more than a year after the negligent act complained of is an unconstitutional choice of law prohibited by the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Constitutional Provisions and Statutes Involved.

The pertinent portions of Section 8324, General Statutes of Connecticut (Rev. 1949), Vol. III, Pages 3041-42, Article I, Sec. 12 of the Constitution of Connecticut (General Statutes of Connecticut (Rev. 1949), Vol. I, Pages 29-30), and Article XIV, Sec. 1 of the Amendments to the Constitution of the United States, are set forth below:

Section 8324, General Statutes of Connecticut (Rev. 1949).

"Sec. 8324. **Limitation of action for injury to person or property.** No action to recover dam-

ages for injury to the person - - caused by negligence - - - , shall be brought but within one year from the date of the act or omission complained of, - - - ."

Constitution of Connecticut, Article I, Section 12.

"Sec. 12. All courts shall be open, and every person, for an injury done him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

Amendments to the Constitution of the United States, Article XIV, Section 1.

"Section 1. - - - ; nor shall any State deprive any person of life, liberty, or property, without due process of law; - - - ."

Statement.

This suit, relying upon diversity of citizenship, was brought to the District Court to recover for personal injuries. The basic facts, which are not in dispute, are as follows:

On January 27, 1955, petitioner, while at work for Patton Creamery Company at its creamery in Springfield, Missouri, was seriously injured when a metal stepladder he was using in his work collapsed while he was standing upon it. The ladder in question was one of two ladders of the same size and type purchased by petitioner's employer, Patton Creamery Company, from Standard Equipment Company of Brooklyn, New York. Because these

ladders were the same in size, shape and appearance, it could not be determined which was the one that collapsed, although it was determined that it was one or the other of them. Both ladders were manufactured by respondent and sold by it to Standard Equipment Company, prior to January 25, 1954.

Petitioner, a resident of the State of Missouri, brought this action against respondent, which is a New York corporation authorized to do business in the State of Connecticut and with an office and place of business at Bethel, Connecticut. The complaint asked damages for petitioner's injuries alleging respondent's negligence in manufacturing the ladder. Suit was commenced January 25, 1956, which was more than a year after respondent made or sold either of the ladders but less than a year after petitioner sustained his injuries, which occurred on January 27, 1955.

After the pleadings were closed, and before trial, respondent moved, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment on the ground that there was no genuine issue as to any material fact because the action was not commenced within one year from the date of the act or omission complained of, relying upon Section 8324 of the General Statutes of Connecticut (Rev. 1949), the significant provisions of which are as follows:

> "Sec. 8324. **Limitation of action for injury to person or property.** No action to recover damages for injury to the person - - caused by negligence - - - , shall be brought but within one year

from the date of the act or omission complained of,----."

At the hearing on respondent's motion for summary judgment, petitioner contended (1) that said statute was substantive in nature and was not applicable under the Connecticut conflict of laws rule; and (2) that if it was applicable it was void because it contravened Article I, Section 12 of the Constitution of Connecticut, guaranteeing to every person, for an injury done him in his person, a remedy by due course of law, and the due process clause of the Fourteenth Amendment to the Constitution of the United States.

After respondent filed its motion for summary judgment, and before the hearing thereon, petitioner moved for leave to amend his complaint to allege that, although the respondent knew, or in the exercise of reasonable care should have known, that due to its negligence said ladder was unfit and unsafe for the purpose for which it was manufactured, designed and sold, nevertheless, it failed to take any steps to remedy said defective condition, either by repairing or replacing the same, or to warn petitioner or any other person who might have occasion to use said ladder that the same was in such a dangerous and defective condition.

The District Court denied petitioner's motion for leave to amend and rejected petitioner's contention that the statute was substantive and held the statute applicable to petitioner's action. Although the District Court did not in its decision expressly mention petitioner's contention that the statute was unconstitutional, nevertheless it entered judgment for the

respondent and dismissed petitioner's action on the merits, relying upon Dincher v. Marlin Firearms Co., 198 F 2d 821 (2 Cir. 1952) and Vilcinskas v. Sears, Roebuck & Co., 144 Conn. 170, 127 A 2d 814 (1956).

On appeal, the Court of Appeals, without express mention of petitioner's contentions that the Connecticut statute contravened both the Connecticut and Federal constitutions and that it was substantive and therefor not applicable under the Connecticut conflict of laws rule, nevertheless held that the District Court did not err in holding that the claim stated in petitioner's original complaint was barred by the Connecticut statute, referring with approval to Dincher v. Marlin Firearms Co., supra, and Vilcinskas v. Sears, Roebuck & Co., supra. But the Court of Appeals found that the District Court erred in denying petitioner's motion for leave to amend, holding that if the complaint were amended as proposed, the amended complaint would then state a good cause of action which would not be barred by the Connecticut statute, and remanded the case to the District Court for the purpose of having that court exercise its discretion on petitioner's motion for leave to amend in the light of the opinion of the Court of Appeals.

The net result of the holding of the Court of Appeals is that the Connecticut statute barred petitioner, from the moment his cause of action accrued, from all resort to the Connecticut courts to enforce his right to compensation based on respondent's negligent manufacture of the ladder, although he is at liberty to pursue in the District Court such remedy

as remains open to him for respondent's negligence in failing to remedy the defect in the ladder and in failing to warn petitioner of the defect.

Reasons for Granting the Writ.

1. The decision of the court below is either in direct conflict with the decision of the Circuit Court of Appeals in the Ninth Circuit, viz., **Lamb v. Powder River Livestock Co.**, 132 Fed. 434 (1904), or the principles which must have controlled the decision of the court below are in direct conflict with those that controlled the decision in that case. If anything, the decision of the court below represents a more drastic violation of the principles which were held to require a reversal in **Lamb v. Powder River Livestock Co.**, supra. In that case it was held that a state statute of Colorado was unconstitutional, as violative of due process, which barred suit against a resident of Colorado upon a judgment obtained in a foreign state which was based on a cause of action which had accrued more than six years before the bringing of suit in Colorado unless brought within three months from the date the judgment was rendered. There, a statute was held invalid because the time it allowed for suit, after the accrual of the cause of action to which it applied, was too short, whereas the court below sustained the validity of a statute which allowed no time at all to petitioner within which to bring suit after his cause of action accrued. The fundamental principle which controlled the decision of the court in the **Lamb** case is that a statute of limitation, to comply with the requirement of due process, must accord a reasonable

time for resort to the courts for the enforcement of rights of action upon which it is intended to operate. The decision of the court below is in direct conflict with that principle for it sanctioned the application of a statute which barred petitioner's action because he failed to bring it within a period of time which had already elapsed before his right of action accrued, thus denying to petitioner any time for resort to the courts for the enforcement of his right of action.

Although more than 50 years have elapsed since the decision in **Lamb v. Powder River Livestock Co.**, supra, was rendered, the principles announced in that decision are so obviously sound, and so almost universally taken for granted, that it is clear that that decision has lost no vitality by the passage of time. The inference seems clear that the soundness of those principles is so obvious that no one has, until now, thought to challenge them. The question of whether considerations of due process will permit principles so fundamental and so wholesome to be challenged at this late date is one that this Court should consider.

The question raised here is of considerable importance for upon it depends whether many persons throughout the country, upon whom serious personal injuries have been negligently inflicted, shall be afforded an opportunity for resort to the courts for the enforcement of their rights to compensation. Connecticut is largely a manufacturing state and its manufactured products are, through the channels of commerce, distributed widespread throughout the nation. Firearms, automotive and aircraft parts are

but a few of the articles manufactured in Connecticut capable of causing serious personal injury unless carefully manufactured. Much of this manufacturing is done by corporations upon whom process can be served only in Connecticut. The decision of the court below in large measure furnishes to such manufacturers a virtual amnesty from suit for injuries occurring beyond the borders of Connecticut due to their negligently manufactured articles. Time is needed for such manufactured articles to find their way through the channels of commerce to the ultimate user, and, in a great many cases, more time will be needed for the defects in these negligently manufactured articles to show up and produce their harmful consequences. Unless suit can be brought in Connecticut, a good many of such injured persons will be left without remedy. Such is the result produced by the decision of the court below. The only way to guarantee a remedy in such cases is for this Court to consider the important question presented here.

2. The court below has decided an important question of federal law which has not been, but should be settled by this Court. That question is whether a state can, consistent with due process, deny a remedy to a litigant for an injury suffered beyond its borders because he failed to bring his suit within a period of time which had already elapsed when his cause of action accrued. If it be conceded that it is within the police power of a state to enact legislation which prevents liability for the consequences of negligent conduct which occur more than a specified time after the date of the conduct, the question remains whether a state has legis-

lative jurisdiction to control liability for consequences occurring beyond its borders. If it does not, may it accomplish the same result by denying, to one who was negligently wronged beyond its borders, all access to its courts because of the passage of time prior to the accrual of his right of action? Does the passage of time prior to the accrual of a cause of action justify a state in withholding a remedy for a liability which it has no power to control? Is such denial of remedy prohibited by the due process clause of the Fourteenth Amendment to the Federal Constitution? That for every legal wrong the law shall afford a remedy is the keystone of every civilized system of jurisprudence. Whether state legislation may, consistent with due process, undermine this keystone is a question so fundamental and far-reaching that it should be considered by this Court.

3. When one considers together the limited remedy left open to petitioner, by the decision of the court below, with the failure of that decision to expressly mention the important issues raised here, it is possible that the court below was reluctant to meet those issues and speculated with avoiding them on the chance that petitioner would be satisfied with a limited remedy. A consideration of such possibility, with its far-reaching effect of rendering untold numbers of negligently injured persons remedyless, or of seriously clogging their remedy, with the possibility that such avoidance may effect a subtle denial of due process, should move this Court to grant review.

Although the disputed statute in the case at bar

has been revised (1957 Connecticut Public Act No. 467[1]), the revision is such that the problem will continue to arise in the future. The only effect of the revision, so far as the problem at hand is concerned, is that the time has been lengthened for bringing suit from one to three years from the date of the act or omission complained of. As revised, this statute will still bar the bringing of suit in cases where the injured person's cause of action accrues more than three years after the date of the negligent conduct. In such cases, the statute, as revised, will still prevent all opportunity for resort to the courts in Connecticut.

Considering the peculiar circumstances of the case at bar, the fact that it is at an interlocutory rather than a final stage should be no sufficient reason for denying this petition. Although the court below reversed and remanded to the District Court so that petitioner will be afforded a remedy for respondent's negligence in failing to remedy the defect in the ladder and in failing to give warning of it, nevertheless, his remedy is seriously clogged by the decision of the court below. It denies him a remedy for respondent's negligence in manufacturing the ladder. The issue here is "fundamental to further conduct of the case" within the rule announced by this Court in **Larson v. Domestic & Foreign Corp.**, 337 U. S. 682, 685, n.3, 93 L. Ed. 1628, 1630 n.3, and **Land v. Dollar**, 330 U. S. 731, 734, n.3, 91 L. Ed. 1209, 1215 n.2, in both of which certiorari was granted although the case was at an interlocutory stage.

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[1]The significant provisions of this statute as revised are set out in the Appendix at page 21.

The extraordinary inconvenience that would result to the parties in the case at bar if petitioner was unsuccessful in a trial on the restricted ground now left open to him and was forced to another appeal to the Court of Appeals, and possibly a further petition for certiorari to this Court, can only be prevented by the granting of this petition. **American Construction Co. v. Jacksonville T. & K. W. R. Co.**, 148 U. S. 372, 384, 72 L. Ed. 486.

Conclusion.

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

JOHN J. HUNT,
Counsel for Petitioner.

APPENDIX.

OPINION OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT (R. 14a)

Waterman, Circuit Judge:

Edward Rogers, a resident of Missouri, brought this action against the White Metal Rolling and Stamping Corporation, a New York corporation authorized to do business in Connecticut,[1] to recover damages for personal injuries he sustained in Missouri while he was using a ladder manufactured by the defendant. Defendant moved for summary judgment. Thereafter, and before decision upon defendant's motion, plaintiff sought leave to amend his complaint. The District Court denied plaintiff leave to amend and granted defendant's motion for summary judgment. From these orders plaintiff appeals.

On January 27, 1955, the plaintiff, while employed by the Patton Creamery Company at its creamery in Springfield, Missouri, was injured when a ladder which he was using collapsed while he was standing upon it. The ladder had been purchased by Patton no later than March 11, 1954 from the Standard Equipment Co. of New York, who, in turn, had purchased it from the defendant manufacturer. The trial court found that the ladder had been manufactured prior to January 25, 1954. On January 25, 1956, less than a year after the date of the injury,

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[1] Jurisdiction over the person of the defendant was obtained by service of summons upon the Secretary of State as its statutory agent. See General Statutes of Connecticut Sec. 2590d (Supp. 1955).

but more than a year after the ladder had been manufactured by the defendant, the plaintiff instituted this action in the United States District Court for the District of Connecticut, alleging the negligent manufacture of the ladder and its consequent unfitness for the purpose for which it was sold. By its motion for summary judgment, the defendant asserted that the plaintiff's claim was barred by the Connecticut statute of limitations[1] since the action was not commenced "within one year from the date of the act or omission complained of * * * "

The District Court, relying on **Dincher v. Marlin Firearms Co.**, 198 F. 2d 821 (2 Cir. 1952) and **Vilcinskas v. Sears, Roebuck & Co.**, 144 Conn. 170, 127 A. 2d 814 (1956), properly held that the claim stated in plaintiff's original complaint was barred by the statute and granted the motion.

After defendant filed its motion, but before the court granted it, the plaintiff, pursuant to Rule 15(a) Fed. Rules Civ. Proc., sought leave of the court to amend his original complaint to allege the negligence of the defendant "in that although it (the de-

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[1]Section 8324 of the General Statutes of Connecticut (Rev. 1949) provides:

"Sec. 8324. LIMITATION OF ACTION FOR INJURY TO PERSON OR PROPERTY.

No action to recover damages for injury to the person, or to real or personal property, caused by negligence, or by reckless or wanton misconduct, or by malpractice of a physician, surgeon, dentist, chiropodist, chiropractor, hospital or sanatorium, shall be brought but within one year from the date of the act or omission complained of, except that a counter-claim may be interposed in an action which has been brought within the year at any time before the pleadings in such action are finally closed."

fendant) knew, or in the exercise of reasonable care should have known, that due to its negligence said ladder was unfit and unsafe as aforesaid, nevertheless, it failed to take any steps to remedy said defective condition either by repairing or replacing the same, or to warn the plaintiff or any other person who might have occasion to use said ladder that the same was in such a dangerous and defective condition." The court, by an order dated January 3, 1957, the same day that it granted defendant's motion for summary judgment, denied this motion of plaintiff on the apparent ground that under Connecticut law the claim stated in the amended complaint also would be time-barred.

The granting or the denial of a motion to amend a complaint filed after a responsive pleading has been served[1] is within the discretion of the trial court, 1 Barron and Holtzoff, Federal Practice and Procedure Sec. 445 (Rules Ed. 1950). However, the appellate court should vacate the judgment below if the denial was based upon an erroneous belief that the amended complaint would fail to state a claim upon which relief could be granted, cf. Sheridan-Wyoming Coal Co. v. Krug, 172 F. 2d 282 (App. D. C. 1949) rev'd on other grounds, sub nom. Chapman v. Sheridan-Wyoming Coal Co., 338 U. S. 621 (1950); cf. United States v. A. H. Fischer Lumber Co., 162 F. 2d 872 (4 Cir. 1947); or if the controlling law has been altered or clarified during the time the appeal has been pending, cf. Vandenbark v. Owens-Illinois Glass Co., 311 U. S. 538 (1941).

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[1]Prior to its motion for summary judgment, the defendant had filed its answer to the original complaint.

Within three months after the U. S. District Court entered judgment for this defendant, the Supreme Court of Errors of Connecticut in **Handler v. Remington Arms Co.**, 144 Conn. 316, 130 A. 2d 793, 795 (March 26, 1957) again construed Section 8324 (note 2 supra), and concluded that "When the wrong sued upon consists of a continuing course of conduct, the statute does not begin to run until that course of conduct is completed."

In **Handler** the continuing course of conduct alleged to be wrongful was the failure of the defendant manufacturer to inform the user of the dangerous condition of the product manufactured by the defendant. The Connecticut court, 130 A. 2d 793, at 795, characterized this wrongful conduct: "This was not a claim of an act or omission completed at the time the ammunition was sold • • • Instead it was a claim of conduct continuing to the time of injury." In the present case the plaintiff seeks by his proposed amendment to allege a similar failure of duty in that the defendant did not warn him of the defective condition of the ladder. Hence it follows that if upon the allowance of the plaintiff's proposed amendment the complaint would state a good cause of action the cause of action so stated would not be time-barred by Section 8324.

Under Connecticut law we are referred to the law of Missouri to determine if the amended complaint would state a cause of action. **Bohenek v. Niedzwiecki**, 142 Conn. 278, 113 A. 2d 509 (1955). Analysis of the decisions of the Missouri courts establishes that plaintiff not only has a cause of action for the negligent manufacture of the ladder,

Willey v. Fyrogas Co., 363 Mo. 406, 251 S.W. 2d 635, but that the liability of defendant may also be predicated upon its continuing failure to warn plaintiff of the defective condition of the ladder. Spurlock v. Union Finance Co., 363 Mo. 62, 248 S. W. 2d 578; Orr v. Shell Oil Co., 352 Mo. 288, 177 S. W. 2d 608; Wickman v. Allis Chalmers Mfg. Co., 117 F. Supp. 857 (W. D. Mo. 1954), reversed on other grounds, 220 F. 2d 426, cert. denied, 350 U. S. 835. The Orr case was an action to recover damages for injuries sustained by the plaintiff due to the toxic effects of a chemical which he handled during the course of his employment. Recovery was sought from the company which supplied the chemical to plaintiff's employer. The Supreme Court of Missouri affirmed a judgment for the plaintiff, basing its decision upon the failure of defendant to warn plaintiff of the dangerous properties of the chemical. In its opinion the court spoke of the "inherently dangerous" qualities of the chemical, but there is no indication that by the use of this phrase the court intended to limit the applicability of its decision. In fact, such an inference is expressly negatived by the court's reliance upon Section 388 of the Restatement of Torts, the text of which was quoted in full in the court's opinion and which is set forth in the margin.[4]

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[4]The Missouri court in Orr v. Shell Oil Co., 352 Mo. 288 at 294-295, 177 S. W. 2d 608 at 612, said: "The rule has been more fully expressed in the Restatement of Torts, Sec. 388 where its application to this case is plainly demonstrated." Then Section 388 is quoted in full. It reads:

Sec. 388. CHATTEL KNOWN TO BE DANGEROUS FOR INTENDED USE.

One who supplies directly or through a third person a chattel for another to use, is subject to liability to those whom the supplier should expect to use the chattel with the

When the conditions for imposing liability set forth in Section 388 are fully met, the applicability of the section is not limited to the suppliers of "inherently dangerous" products. It is immaterial whether the chattel is "inherently dangerous" or dangerous because defectively manufactured. For example, one of the fact situations illustrating the meaning of Section 388 deals with the liability thereunder of a manufacturer of ladders.[3]

We conclude that if the complaint were amended as proposed, the amended complaint would then state a good cause of action which would not be barred by the Connecticut statute of limitations. The

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consent of the other or to be in the vicinity of its probable use, for bodily harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

(a) knows, or from facts known to him should realize, that the chattel is or is likely to be dangerous for the use for which it is supplied;

(b) and has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition; and

(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be so.

[3]The illustration referred to is Illustration 4 found in the Comments on Section 388 at p. 1047 of Restatement of the Law of Torts, 1934 edition. It reads:

4. The A Manufacturing Company makes a lot of ladders out of a parcel of wood, some of which is knotted. It is impossible to see the knots after the ladders are painted. One of the ladders is sold to B. While C, B's servant, is using the ladder it breaks because of the knots in the wood of which it is made. The A Company is liable to C, although at the time the ladder was sold it appeared perfectly sound and the sales department which sold the ladder had not been informed that defective material had been used in the construction of this lot of ladders.

order of the district court denying leave to amend was handed down prior to the decision in Handler v. Remington Arms Co., supra. Under these circumstances, we are remanding to the District Court in order for it to exercise its discretion in the light of the Handler opinion. See the mandate of the Court of Appeals in Sheridan-Wyoming Coal Co. v. Krug, 168 F. 2d 557 (App. D. C. 1948) quoted in Sheridan-Wyoming Coal Co. v. Krug, 172 F. 2d 282 at 284.

Vacated and remanded.

* * * *

JUDGMENT OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT (R. 21a)

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12th day of November, one thousand nine hundred and fifty-seven.

Present: HON. HAROLD R. MEDINA,
HON. CARROLL C. HINCKS,
HON. STERRY R. WATERMAN,
Circuit Judges

Edward Rogers,
Plaintiff-Appellant
v.
White Metal Rolling & Stamping Corporation
Defendant-Appellee

Appeal from the United States District Court for the District of Connecticut

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is vacated and action remanded in accordance with the opinion of this court; with costs to the appellant.

A. Daniel Fusaro
Clerk

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1957 PUBLIC ACTS OF THE STATE OF CONNECTICUT (PAGE 688)

PUBLIC ACT NO. 467

"AN ACT CONCERNING LIMITATION OF ACTION FOR INJURY TO PERSON OR PROPERTY."

"Section 8324 of the General Statutes is repealed and the following is substituted in lieu thereof: No action to recover damages for injury to the person, - - - , caused by negligence, - - - , shall be brought but within one year from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of - - - - ."

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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

FRANCIS A. SMITH, JR.
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BRIEF FOR RESPONDENT IN OPPOSITION.

Respondent prays that the Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit be denied.

REASONS FOR DENYING WRIT.

1. The judgment of the Court below is not final. It was ordered that the judgment of the United

States District Court for the District of Connecticut be vacated and the action remanded in accordance with the opinion of the Court below. (Petitioner's Appendix at page 21)

The petitioner may yet proceed on his cause of action as set forth in his amended complaint. For that reason, the judgment of the lower court is interlocutory rather than final. From the earliest days, the Supreme Court of the United States has refused to accept jurisdiction of interlocutory decrees. **Gibbons v. Ogden**, 6 Wheat. 448, 5 L. Ed. 302.

In **Collins v. Miller**, 252 U.S. 364, 370, 40 S. Ct. 347, 349 (1920), Mr. Justice Brandeis, speaking of the finality requirement said:

> "To be appealable the judgment must be not only final, but complete . . . and the rule required that the judgment to be appealable should be final not only as to all parties, but as to the whole subject matter and as to all the causes of action involved . . . " (Citations Omitted)

The petitioner's sole basis for appeal is the validity of a state statute. Where the validity of a state statute is drawn in question on the ground of repugnance to the Constitution, it has been held that appeal lies only from a final judgment or decree. **Slaker v. O'Connor**, 278 U.S. 188, 73 L. Ed. 258 (1928); **Martinez v. International Banking Corp.**, 220 U.S. 214, 223, 55 L. Ed. 438, 443 (1910).

It is, of course, quite true that there are exceptions to this rule. **Larson v. Domestic & Foreign Corp.**, 337 U.S. 682, 93 L. Ed. 1628 (1948); **Land v. Dollar**,

330 U.S. 731, 91 L. Ed. 1209 (1946). Both of these cases involved the United States Government and questions of such great import that their determination was fundamental to the further conduct of the cases. Because of the fact that both involved restraining orders against the United States, immediate action by the Supreme Court was necessary.

2. The petitioner has endeavored to demonstrate a conflict of authority between the Ninth Circuit and the Second Circuit, viz., **Lamb v. Powder River Livestock Co.**, 132 Fed. 434 (1904). The **Lamb** case involved a statute of the State of Colorado relating to limitation of actions on foreign judgments. It therefore involved the cutting down of a right of action which had already come into existence. The plaintiff had a vested right in the cause of action and thus a property right that was taken away by the statute. The petitioner, in the case at bar, had no cause of action until the ladder broke. There is, of course, a marked distinction between a statute which cuts down an existing right of action and one which bars an action before it has accrued or cuts down the period within which such an action may accrue.

3. The statute in dispute in the case at bar has now been revised. Public Acts of the State of Connecticut, No. 467 (1957) (Petitioner's Appendix at page 21) In its present form, the statute extends the time for bringing suit from one to three years from the date of the act or omission complained of. Thus, the sole objection to the statute has now been removed, the statute itself being consonant with the very purposes of statutes of limitations.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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